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Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
Petitioner,

LILLIAN BOEHM,
Petitioner-Intervenor,

vs.

MANHATTAN RAILWAY COMPANY *et al.*,
Respondent,

THE AMERICAN BRAKE SHOE & FOUNDRY COMPANY,
Respondent,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF THE CITY OF NEW YORK AS AMICUS CURIAE AND MOTION FOR LEAVE TO FILE THE SAME

ARTHUR J. W. HILLY,
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City of New York.

EDGAR J. KOHLER,
FRANK E. CARSTARPHEN,
Of Counsel.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it Please the Court:

The undersigned, as counsel for The City of New York, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The City's interest in the case, both pecuniary and as *parens*

urbis, is outlined in the accompanying brief (pp. 1-4) and the resolution of its Board of Estimate and Apportionment (pp. 43-44). The City's pecuniary interest in the subways involved is estimated at $309,186,421.71 and they are operated under contracts with it, providing for continuous carriage over them and the Manhattan Railway Company's lines at certain points at a single fare of five cents. In the receivership Court, Judge Manton directed service upon the Corporation Counsel of all papers, including notices of motion, and also ordered that the City might, without intervening or appearing, be heard from time to time to make suggestions to the Court on matters affecting the public interest or the City's interest as owner of the subways and the grantor of the elevated railroad franchise, so that the City occupied below substantially the status of *amicus curiae*.

Counsel for all the parties have consented to the granting of this motion.

Respectfully submitted,

ARTHUR J. W. HILLY,
Corporation Counsel.

EDGAR J. KOHLER,
FRANK E. CARSTARPHEN,
Of Counsel.

April 14, 1933.

INDEX.

PAGE

STATEMENT 1

I—In disregard of principles enunciated by this Court the Interborough and affiliated parties are threatening to convert this receivership into an instrumentality for disrupting and disintegrating the system of subway and elevated lines which the Interborough is under obligations by franchise and by contract with the City (which obligations have the force of law) to operate as an integrated system on a five-cent fare with certain rights of free transfer as between elevated and subway lines..... 5

II—It is well settled that obligations of the character thus assumed by the Interborough in the Elevated Extension and Additional Tracks Certificates, having been made a condition of the constitutional consent of the local authorities under Article III, Section 18 of the State Constitution, have the force of law in the sense that a breach of them constitutes a violation of law. It necessarily follows that these public obligations must be lived up to by, and are binding upon, the federal receivers, and do not come within the class of contracts as to which receivers have the power to elect to disaffirm and refuse to adopt..... 24

III—In 1922 the Legislature amended Section 49, subd. 4 of the Public Service Law by adding a provision specifically designed to clothe the Transit Commission with power to order the continuance of these through routes and transfers of passengers between the Interborough and Manhattan railways in case the Manhattan

PAGE

lease of 1903 should be abrogated, either by disaffirmance or by reentry of the owners upon the Manhattan leased property. The rights of the City and of the travelling public under this provision have been ignored and should now receive paramount consideration 28

IV—In case the Interborough interests hereafter contend that a disaffirmance of the lease would result in the abrogation of any of the through route and free transfer privileges which have been superimposed upon the lease, any such contention should be submitted to the State Courts and not to the Federal Receivership Court for adjudication 32

V—If this Court should decide that a receivership of the Interborough should continue, the City of New York respectfully suggests that for the protection of its rights this Court impose the following conditions and directions for the conduct of the receivership:

First: That the Receivers should not disaffirm any lease or otherwise impair their present ability to perform all franchise obligations to the City (including the preservation of through routes, free transfers and the five cent fare), without previously making alternative arrangements for furnishing, at the expense of the Interborough, the same through routes and free transfers at the existing fare of five cents and no more..... 37

Second: That if the receivership is to be continued, the Receivers be instructed to use every effort to effect an extension, renewal or refunding of the past due Interborough notes 39

Third: That if the receivership is to be continued, it should be expressly without prejudice to the right of the City to have its rights under its contracts with the Interborough and under grants of franchises and other

PAGE

rights to the Interborough and to the Manhattan Railway Company, declared and enforced from time to time in appropriate proceedings in the Courts of the State of New York 39-40

Fourth: That if the receivership is to be continued, the receivers should be instructed to adhere to the strictest economy and to avoid all unnecessary expenditure in the further conduct of the receivership..... 40-41

Fifth: That if the receivership is to be continued, the receivership Court should be instructed to terminate the receivership as speedily as possible..... 41-42

Appendix A: Board of Estimate and Apportionment, City of N. Y., Resolution Sept. 30, 1922..... 43

Cases Cited

PAGE

American Brake Shoe & Foundry Co. vs. *New York Railways Co.* (S. D. N. Y. 1919) 8, 12, 42

Brooklyn Rapid Transit Company Receivership (*Westinghouse Electric & Mfg. Co.* vs.; S. D. N. Y. 1918) 11, 40, 42

City of New York vs. *Interborough Rapid Transit Co.*, 257 N. Y. 20 ..... 6, 7, 20, 21, 23

Drexler vs. *Bank*, 5 Fed. (2) 13 (C. C. A.) 33

Employers' Liability Cases, 207 U. S. 463 3

Erb vs. *Morasch*, 177 U. S. 584 26

Gas & Electric Securities Co. vs. *Manhattan & Queens Traction Co.*, 253 Fed. 453 27

Gilchrist vs. *Interborough Rapid Transit Co.*, 279 U. S. 159 ..... 3, 5, 12, 33, 40

Harkin vs. *Brundage*, 276 U. S. 36 ..... 16, 41

Joy vs. *St. Louis*, 138 U. S. 1 15

Lake Superior & Mississippi R. R. vs. *U. S.*, 93 U. S. 442 38

Lorain Steel Co. vs. *Union Ry. Co.*, 165 Fed. 500, 502-3. 27

Re Metropolitan Railway Receivership, 208 U. S. 90 ... 11, 15, 41, 42

Michigan vs. *Michigan Trust Co.*, 286 U. S. 334 16

Paige vs. *Schenectady Ry. Co.*, 178 N. Y. 102 26

Pittsburgh & Shawmut Coal Co. vs. *Delaware & N. R. Co.*, 289 F. R. 133 27

Public Service Commission vs. *Westchester St. Ry. Co.*, 206 N. Y. 209 18

Matter of Quinby vs. *Public Service Commission*, 223 N. Y. 244 24

Robinson vs. *Lee*, 122 Fed. Rep. 1010, aff. 196 U. S. 64 .. 3

Rogers vs. *Guaranty Trust Co.*, 77 L. Ed. Adv. Op., U. S. S. Ct., Jan. 23, 1933 33

Shapiro vs. *Wilgus*, 77 L. Ed. Adv. Op., U. S. S. Ct. 149. 16

State of North Carolina, through Brummitt, Att'y. Gen., vs. *Southern Ry. Co.*, 30 Fed. (2) 204 3

Union Pacific vs. *Chicago R. I. & P. Rys.*, 163 U. S. 564. 38

U. S. ex rel. vs. *Tyler*, 269 U. S. 13 33

PAGE

Westinghouse Electric & Mfg. Co. vs. *Binghamton R. Co.*, 255 F. R. 378 27
Willcox vs. *Richmond Light & R. R. Co.*, 142 App. Div. 44, aff. 202 N. Y. 515 ..... 25, 36

STATUTES AND WORKS CITED

Baldwin's American Railroad Law 38
Board of Estimate & Apportionment, City of N. Y., Resolution, Sept. 30, 1932 (Appendix A) 43
Constitution, State of N. Y., Article III, Sec. 18 ..... 23, 24
Public Service Law Amendment, Article VII, by Ch. 689 of Laws of 1931 3
Public Service Law, Sec. 49, subd. 4, as amended in 1922 ..... 28-30, 32, 38
Public Service Law, Sec. 57 36
Rapid Transit Act, Sec. 9 35-36
U. S. Code, Title 8, Sec. 124 25

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BRIEF ON BEHALF OF THE CITY OF NEW YORK,

Amicus Curiae.

(Originally a defendant in the Johnson Suit.)

Statement.

In the *American Brake Shoe & Foundry* suit, in which Judge Manton appointed the Receivers, the City of New York was not made a party defendant. Under instructions from

the Board of Estimate and Apportionment the Corporation Counsel stated to the Court at one of the first hearings in the cause that the City did not ask to intervene, though in certain eventualities it might wish to take action in the Federal or State courts for the protection of the City's property and other rights, and asked in the meantime that the City as an interested public authority, following the practice pursued in previous Federal receiverships of traction companies of New York City, be accorded the courtesy of having copies of all papers, including notices of motion, furnished to the Corporation Counsel. He furthermore said that, without intervening or appearing (except by special appearance and in reality as *amicus curiae* if the Court would so permit), the City might desire occasionally to make suggestions to the Court on matters affecting the public interest or the City's interest as owner of the subways and the grantor of the elevated railroad franchises. The Corporation Counsel made this request pursuant to a resolution of the Board of Estimate and Apportionment of the City of New York, adopted September 30, 1932, copy of which resolution is annexed as Appendix A to this brief. Judge Manton approved of this course of procedure, which has since been followed and the City has accordingly occupied substantially the status of *amicus curiae* in the Court conducting the receivership.

In the *Johnson* suit the City was made a party defendant, but it participated in no way in the controversy as to whether Judge Manton had acted lawfully or within his jurisdiction and power in appointing Dowling and Murray, Receivers of the Interborough Rapid Transit Company, or Roberts, Receiver of the Manhattan Railway Company.

In the hearing before Judge Woolsey October 18th, 1932, at the request of counsel for the City, who explained that the City expected to move to dismiss the complaint for failure to state a cause of action as against it, Judge Woolsey inserted in his own handwriting in the order of consolidation he that day settled and signed, the following words, "The City of New York, defendant in equity No. 71-153 neither consenting nor opposing." (Record, p. 983, folio 2947, pp.

992-994, folios 2976-2981). The original order on file in the Clerk's office of the U. S. District Court so recites, but by typographical error, the order of consolidation as printed in this Certiorari Record (pp. 722-724, folios 2164, 2167) reads "The City of New York, defendant in equity No. 71-153 neither consenting *nor appearing*". "*Nor appearing*" is erroneous and should read "*nor opposing*". The further fact is, as appears outside this Record, but will not be disputed, that the City ceased to be a party to the *Johnson* case and to the consolidated cause, these suits being discontinued as to it by order of the District Court made and filed October 24, 1932, upon consent of all the parties.

The Court in the recent five cent fare case of *Gilchrist* vs. *Interborough Rapid Transit Company*, 279 U. S. 159, had occasion to consider the relations of the City to the Interborough, and indeed the opinion of Mr. Justice McReynolds (279 U. S. at pp. 189-211) contains a resume thereof.

The City owns the most important railroads covered by this receivership, to wit, the municipal subways operated by the Interborough under Contracts Nos. 1, 2 and 3, the City's financial stake therein being $309,186,421.71. (See Appendix A to this brief.) The City is also grantor of the franchises for the elevated lines, including the franchises granted by the "Certificates" of 1913 for elevated extensions and third tracks. The indirect interest of the City in this litigation, though not as a party, is apparent. As an investor and proprietor and as grantor of franchises, and also as *parens urbis*, charged with the responsibility of protecting the travelling public, the City feels a deep concern which prompts it to submit this brief as *amicus curiae*. (*The Employers' Liability Cases*, 207 U. S. 463, 490; *State of North Carolina, through Brummitt, Attorney General*, vs. *Southern Railway Company*, 30 Fed. (2d) 204, 210-11; *Robinson* vs. *Lee*, 122 Fed. Rep. 1010, 1011, affirmed, 196 U. S. 64, 65.)

At this particular time the City has an additional and special interest in all of these matters. Under the Public Service Law of the State of New York (Chapter 48 of the Consolidated Laws, Article 7, as amended by Chapter 689 of the Laws of 1931) the Transit Commission of the State

with the approval of the Board of Estimate of the City is charged with the duty of preparing a plan for the relief and improvement of transit in New York City by endeavoring to combine and unify the existing rapid transit and other railroads. The present Mayor of the City of New York has within the past month taken the initiative in actively starting negotiations with representatives of the various groups of security holders of the principal rapid transit companies of the City including the Interborough and Manhattan, with a view to agreeing upon a basis for such plan of unification. By reason of this responsibility with respect to a plan of unification the City is on the one hand in a position which calls for impartiality on its part in its attitude toward the various railroad companies and their respective groups or classes of security holders, and on the other hand the City is naturally opposed to any steps litigative or otherwise that would tend further to separate and disintegrate the railroads which it is the legislative command to the Commission and the City to endeavor to bring into closer unity.

Without involving the City in controversies of this receivership which are none of its concern, we therefore ask leave to call attention as *amicus curiae* to certain aspects of the situation and to proffer certain suggestions in the succeeding Points. The Corporation Counsel is hopeful that this brief may in any event aid the Court in avoiding any incidental decision or observation in its opinion which might embarrass or throw a cloud on the rights of the City and travelling public which they may be called upon to assert in another forum or conceivably in subsequent proceedings in the Courts below.

POINT I.

In disregard of principles enunciated by this Court the Interborough and affiliated parties are threatening to convert this receivership into an instrumentality for disrupting and disintegrating the system of subway and elevated lines which the Interborough is under obligations by franchise and by contract with the City (which obligations have the force of law) to operate as an integrated system on a five cent fare with certain rights of free transfer as between elevated and subway lines.

After the decision of this Court in *Gilchrist* vs. *Interborough Rapid Transit Co.*, 279 U. S. 159, which relegated to the State courts the litigation over the attempt of the Interborough to secure an increase of the five cent fare stipulated in its contracts with the City of New York, the attorney for the Interborough in a brief filed June 9, 1931, before the New York Court of Appeals, by way of reply to a brief of the Corporation Counsel, made a final appeal to the highest State tribunal to so construe the law as at least to adjudge that the five cent fare on the privately owned elevated lines could be increased in the exercise of the State's regulatory power, even if the like fare on the City-owned subway lines were held to be contractual and inviolable in character. In that brief the Interborough counsel used the following language:

> "In the truest sense and in spite of anything the City or the Commission can argue, *the decision of this Court will separate the elevated and the subways as to fares, in one way or another.* Unless this Court holds the elevated lines entitled to a reasonable and adequate rate of fare based on its own independently determined facts and regardless of the subway fare and the subway facts, separation of the elevated and the subway lines and their fares is inevitable and not remote. All of the earnings the Interborough Company gets out of the subway operations, as its preferential return on its investment in the subway properties before 1913, goes to make up the deficit on the

elevated and has now become insufficient for that purpose.

This situation could not continue much longer; and the question is not whether the elevated shall be separated from the subways in respect to rates of fare, but whether *this separation shall be accomplished* through a reasonable increase in fares by a fact-finding tribunal executing the basic policy of the State, *or through a violent dismemberment of a great instrumentality of public service.*" (Italics ours.)

The attorney for the Interborough who filed that brief is the same one who represents the Interborough in the instant causes and who as solicitor for that Company filed its answer consenting to the present receivership. We challenge the learned attorney to say whether this language we have quoted from his brief in the New York Court of Appeals, to the effect that a separation as to fares between the subways and the elevated lines will be effected if not by an increase granted in the exercise of the State's regulatory power then "through a violent dismemberment of a great instrumentality of public service", refers or can refer to anything else than a dismemberment effected by lopping off the Manhattan lease in a receivership.

It may be well at this point to quote the language of the New York Court of Appeals in that case in affirming the lower State Courts and sustaining the contractual and inviolable character of the five cent fare as applicable over the privately owned elevated lines as well as over the City-owned subway lines operated by the Interborough. Speaking by O'Brien, J., that Court said in *City of New York* vs. *Interborough Rapid Transit Company*, 257 N. Y., 20, 36:

> "Although expressions of the detailed purposes of these instruments [the Elevated Extension Certificate and Contract No. 3] are incorporated in separate documents, they were executed on the same day and are so interlocked and combined in their common scheme, so inextricably interwoven, that each must be regarded only as part of an integral transaction."

The Court also squarely rejected the plea of Interborough counsel, above quoted, and said (italics ours) (pp. 37-8):

> "*Separation of rates* on a continuous trip *partly over elevated lines* and *partly over subway lines*, as these roads are defined in the contract [Contract No. 3] and the certificate [Elevated Extension Certificate] *not only would seriously interfere with the avowed purpose of these instruments but, in addition, would create difficulties in administration* similar to those which were recognized in *Matter of Evens* v. *Public Service Comm.* (246 N. Y. 224)" (italics ours).

Parenthetically it may be noted that in the bill of complaint in the Johnson suit (Record, p. 42, folios 124-125) it appears that in the year 1922 Mr. Hedley, President and General Manager of Interborough, stated among other things to the Manhattan stockholders that if a receiver were appointed for Interborough—

> "2. Such receiver would not be permitted to pay the back 7% dividends nor indeed any rental for the Manhattan lines.
>
> "3. Such receiver would therefore temporarily operate the lines in the public interest and the earnings would doubtless be impounded during such operation. No dividends would be paid during such period.
>
> "4. The property would ultimately be surrendered by the receiver to its owners, the Manhattan stockholders.
>
> "5. The Manhattan Company would have to take its property and operate it to preserve its franchises from forfeiture." (Folios 124-125.)

This receivership was instituted as a consent or friendly receivership in the customary manner with which the City of New York and its travelling public have within the last few decades become unfortunately all too familiar, namely, the bringing of a suit in the Federal Court by a general creditor for the administration of the affairs of a financially embarrassed corporation and the simultaneous interposition of an answer by the defendant corporation admitting the alle-

gations of the complaint and joining in the prayer for the immediate appointment of a receiver. In this instance, the general creditor selected to institute the suit was American Brake Shoe & Foundry Company which in 1919 had played a like role as plaintiff in a similar general creditor's suit instituted against the New York Railways Company operating important street surface railways in the Borough of Manhattan, City of New York, at that time under the same ownership and control as the Interborough and represented in fact by the same General Counsel who now represents the Interborough.

The complaint herein upon which the Interborough receivership is founded alleges, by way of the usual character of averment, that there are overdue claims which the defendant is at present unable to pay, and

> "that the holders thereof are pressing for payment thereof; that some of said creditors may bring suits in respect of their said claims and may levy execution upon the equipment and property of the defendant used in the operation of said rapid transit subway and elevated lines and on the material and supplies and other property of defendant on hand and kept by the defendant for necessary use in operating said railway systems, and plaintiff alleges that there is grave danger that the defendant may thereby be deprived of the use of equipment, rolling stock and other property essential to the effective and economic operation of the said railway systems * * *, and that it is essential to the interest of all the creditors of the defendant and the interest of the public and of the plaintiff that the property of the defendant should not be sacrificed * * *. (See complaint, para. 15, Rec. pp. 164, 165, fols. 491, 493)

This complaint further alleges on information and belief,

> "that the only means whereby the defendant can meet its obligations *under said contracts, certificates and leases*, and pay its floating indebtedness and discharge its current obligations is by the continued maintenance and *operation of said railroads by an uninterrupted use thereof;* and that any suits upon or process against its properties or its revenues would seriously

> embarrass and cripple the defendant and diminish, if not destroy, its power successfully to operate said railroad systems; * * * * ". (See para. 16, Rec. p. 166, fols. 496, 497.)

The same paragraph of the complaint further avers:

> "that during the last year the elevated and rapid transit subway lines operated by the defendant carried over 1,000,000,000 passengers, and that it is of vital importance to the people of the City of New York that said elevated and rapid transit subway lines shall continue to be operated and to such end it is of like importance that said systems be preserved * * * * ". (Rec. p. 166, fol. 497).

The complaint further alleges

> "that unless the Court in view of the facts above set forth shall take said railroad systems of the defendant into judicial custody * * * that immediately upon default, individual creditors, and particularly individual holders of the Ten Year Secured Convertible 7% Gold Notes of the defendant will assert their rights and remedies in different courts; * * * ". (page 167, folio 499).

Furthermore, the prayer for relief in this complaint asks *inter alia*

> "That pending such marshalling and administration and final decrees, *and for the purpose of preserving intact the property* and assets of the *defendant* a receiver or receivers may be appointed for the defendant and of all the property and assets of the defendant * * * * *including all railroads, leased or operated* * * * * and with all the incidental powers ordinarily vested in receivers in like cases and with full power and authority to operate the railroads, property and assets of the defendant * * * * * to protect and preserve the corporate franchises, privileges and property * * * * * and to protect and preserve the said railroads, property and assets from being sacrificed under any proceedings which can or may be taken * * * * and to do any and all acts and things which may be necessary to preserve the valuable rights, contracts and franchises of the defendant or otherwise requisite or proper." (Rec. pp. 168, 169, fols. 503-505).

The answer of the defendant Interborough Rapid Transit Company admitted all the allegations of the bill of complaint, joined in the prayer of said complaint, and prayed that

> "this Court, sitting in equity, may take possession of the railroad system of the defendant and of all its property and assets through the appointment of a receiver or receivers as prayed in said bill of complaint and thereby protect and preserve the corporate franchises, privileges, property and assets and preserve the corporate existence of the defendant and protect and preserve its said system * * * * and do any and all acts which may be necessary to preserve the valuable rights, contracts, franchises, property and assets of the defendant; and the defendant accordingly prays * * * * *that this Court will*, for the purposes aforesaid, *appoint a receiver* or receivers as prayed for in said complaint, and empower and authorize such receiver or receivers *to take possession* of the *entire property* and assets of this defendant *and to* preserve, manage, *operate* and control *the same* * * * * *".* (Rec. pp. 171, 172, fols. 512-515).

The order of the District Court made by Judge Manton August 26, 1932 appointing the receivers ordered, adjudged and decreed that Dowling and Murray be appointed receivers (italics ours):

> "of all the property and assets of the said defendant * * * * *including all railroads owned, leased or operated by said defendant* * * * * *; that the said Receivers be*, and they hereby are, authorized immediately to take possession of the same and to run, manage and *operate the said railroads, properties* and assets in such manner as will in their judgment produce most satisfactory results *so that the operation of the railroad system of the defendant shall be continued in the same manner as at present* and *the public duties obligatory upon the defendant be in all respects discharged* * * * * *".* (Rec. p. 180, fols. 540, 541, 542.)

Although the complainant, the American Brake Shoe & Foundry Company was not a lien or judgment creditor,

nevertheless, in view of the foregoing allegations, consent and proceedings, the appointment of the receivers would appear on the face of the record to be sustainable within the holding of this Court in *Re Metropolitan Railway Receivership*, 208 U. S. 90.

In the Metropolitan Railway Receivership, conducted under Judge Lacombe, the travelling public experienced a great disruption of the street railway system, producing the intended result of a splitting up of five cent fares through disaffirmance of leases which under the New York state statutes carried free transfer privileges in favor of passengers. This occurred in spite of the observations of the Court in that case (208 U. S. at 112) where after stating that

> "a court is a very unsatisfactory body to administer the affairs of a railroad"

the Court proceeded:

> "There are cases—and the one in question seems a very strong instance—where, in order to preserve the property *for all interests*, it is a necessity to resort to such a remedy. A *refusal to* appoint a receiver would have led in this instance almost inevitably to *a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city*, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, *and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives.*" (Italics ours.)

Similarly, in the Brooklyn Rapid Transit Company receivership, the District Court, Judge Julius M. Mayer sitting, in 1918 appointed an equity receiver upon the suit of a general creditor, and despite the warning uttered by the Corporation Counsel of the City of New York at the inception and at later stages of the receivership that this receivership should not be utilized (as the Metropolitan receivership had been) for dismemberment by disaffirmance of leases and splitting up of fares contrary to the State policy expressed in a statute requiring free transfers between leased

lines, a process of Federal disintegration again ensued, resulting in a dismemberment and increase of fares over practically all the street surface railway lines as theretofore operated by the Company.

In 1919 the New York Railways Company, the successor upon reorganization of the Metropolitan Street Railway, went into a Federal receivership by order made by Judge Mayer. Here again the Corporation Counsel was accorded the status of *amicus curiae* and made protest on behalf of the City against a repetition of this process of dismemberment and disintegration with consequent splitting up and increase of fares. The Corporation Counsel then urged upon the Court that the continuance of the receivership be subject to the condition:

> "that the unity of the system of railroads as now operated by the defendant including all compulsory free transfer privileges in favor of passengers must be preserved until and except as the Public Service Commission or other valid state or local authority shall otherwise prescribe." (See affidavit of William P. Burr, verified March 31, 1919, printed in Official Record of New York Railway Receivership Proceedings, Vol. I, p. 77.

Nevertheless, in this case also, the process of disintegration and consequent increase in fares through abolition of free transfers went forward in the face of the City's continued protests.

In the case at bar the learned counsel to the petitioners have challenged the validity of the receivership on the ground that it was instituted by collusive prearrangement in the nature of a conspiracy to lop off the Manhattan lease and thus relieve the Interborough security holders of the large rental payments which had been making operation under such lease a source of loss to them for many years. (See *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 200, also 210). Despite the apprehension which the City naturally felt in this regard, particularly in view of its experience in previous receiverships of street railroad com-

panies, the City is not prepared to join in this challenge to the jurisdiction.

The allegations of the complaint, the admissions and averments in the answer, and the provisions of the order upon which this receivership was instituted by Judge Manton and from which we have quoted above, contain no indication of an intention to disrupt the system, and unless there was proved an intention to deliberately conceal from the Court the true purpose of the receivership, all persons interested had a right to conclude that the receivership was brought to conserve the system as it existed, including uninterrupted operation over the elevated lines. Seven months, however, have now elapsed since the receivers were appointed and enough has developed to make clear that certain Interborough security holders intend, and the Interborough receivers claim power, to use the receivership as an instrumentality for disaffirming the Manhattan lease of January 1, 1903, and this in disregard of the fact that there have been superimposed upon the lease various free transfer privileges without increase of the five cent fare, and important through route obligations, all assumed by the Interborough toward the City and the public by subsequent contracts and the acceptance of subsequent franchises granted by way of extension and enlargement of the lines originally leased from the Manhattan in 1903.

At a hearing before Judge Manton on October 3, 1932, counsel representing the Committee for the protection of holders of Interborough Ten Year 6% Unsecured Gold Notes due October 1, 1932 (of which about $10,000,000 are outstanding), said:

> "Let's talk the reality again, and everybody knows —what possible motive could there be for the Interborough carrying this property at a loss of several million dollars a year more than it can earn, and in a period when its earnings are constantly declining? * * *
>
> "I think everybody knows as a practical matter that there will be an application to cancel that lease. * * *
>
> "I am quite willing to give notice that I will

> make that application very soon—well in a very few days. It is impossible that an application won't be made."

The intentions of certain security holders in this regard have thus been definitely stated. The Receivers' view that there is a power to disaffirm the lease is apparent from their own application recently filed for instructions to excuse them from making further payments to Manhattan bondholders and others called for by the lease while at the same time continuing to hold the leased lines during a so-called trial period. In the petition upon that application, verified March 14, 1933, they said:

> "While the Interborough Receivers assert that they have the absolute legal right to disaffirm the Manhattan lease, if in their judgment it appears in the interest of the receivership estate so to do, it it is not intended by the foregoing recommendations to obtain from the Court at this time any determination as to the existence of such right, and your petitioners therefore recommend that the Court in the order entered on this application reserve full power and jurisdiction hereafter to determine any questions raised with respect to such right of disaffirmance."

Notwithstanding these declared intentions of disaffirmance and these claims of power to disaffirm, made in the Federal Court, neither the Receivers nor any security holders have yet applied to the Transit Commission or to the City, either formally or informally, with a view to making substitute arrangements to preserve the through routes, the free transfers and the five cent fare or to carry out the obligations of the Interborough with reference thereto, in the event of a disaffirmance or cancellation of the lease. Although the City does not challenge the jurisdiction of this receivership in its inception, the City does contend that the drift is distinctly toward an abuse of the receivership and that grave threats now exist that it will be perverted into an instrumentality for further disrupting the transit systems and destroying the valuable rights of the public with respect thereto.

As we understand the decisions and pronouncements of this Court, particularly since *Re Metropolitan Receivership*, 208 U. S., *supra*, even though a consent receivership instituted on general creditor's bill is valid in its inception, nevertheless if the course of the receivership involves abuse and conversion of its aims from the proper object of conservation to a policy of obstruction and frustration particularly of the public policy of the State and locality in respect of a local public utility, that is enough to call for either a vacating of the receivership or else for its continuance only upon condition that such abuse of the process of the Court be eliminated.

In *Re Metropolitan Railway Receivership*, 208 U. S. 90, 111, 112, after recognizing that a Court or its receiver was "a very unsatisfactory body to administer the affairs of a railroad as a going concern," the Court said:

> "* * * we feel that the possession of such property by the court through its receivers should not be unnecessarily prolonged * * *.
>
> The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it."

And the Court further added (italics ours), page 112:

> "*We have no doubt, if unnecessary delays should take place, the court would listen to an application* by any creditor, upon due notice to the receivers, *for orders requiring the closing of the trust* as soon as might be reasonably proper, or *else vacating the orders appointing the receivers.*"

In *Joy v. St. Louis*, 138 U. S. 1, the Court said (page 47; italics ours):

> "Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court. These considerations have been recognized and applied by this court in several cases. *Barton v.*

> *Barbour*, 104 U. S. 126; *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, 311, 312; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 458."

In *Michigan* v. *Michigan Trust Company*, 286 U. S. 334, 345, it was said:

> "Receiverships for conservation have at times a legitimate function *but they are to be watched with jealous eyes lest their function be perverted.*" (Italics ours.)

In the very recent decision of this Court, in *Shapiro* v. *Wilgus*, argued in this term and decided December 5, 1932 (See 77 L. Ed. Adv. Ops. pp. 149, 152), the Court said: (Italics ours.)

> "True indeed it is that receivers have at times been appointed even by federal courts at the suit of simple contract creditors if the defendant was willing to waive the irregularity and to consent to the decree. *This is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good.* Re Metropolitan R. Receivership, 208 U. S. 109, 111, 52 L. Ed. 412, 413, 28 S. Ct. 219." (Italics ours.)

And the Court added:

> "*Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public* policy of the state or the *locality.*" (Italics ours.)

See also *Harkin* v. *Brundage*, 276 U. S. 36.

At this point it would seem proper to state briefly to the Court, the source and nature of the Interborough's public obligations which have been superimposed upon the Manhattan lease and which have been assumed by the Interborough subsequent to its becoming such lessee of the Manhattan railroad elevated lines early in 1903. Attention should be called to three distinct subsequently imposed public obligations that come within this category.

First: The Interborough had been incorporated in 1902, for the express purpose of operating the City-owned subway constructed under Contract No. 1, of which it became the

assignee from the original contractor, John B. McDonald. By an agreement made July 16, 1903, modifying Contract No. 1 to which the City of New York, John B. McDonald and the Interborough Rapid Transit Company were parties, a modification of the routes and general plan for the City-owned rapid transit railroad to be constructed and operated under Contract No. 1 was agreed upon, with the object of providing for a spur connection with the Manhattan elevated lines at Westchester Avenue, near 149th Street. The City, acting by its Board of Rapid Transit Railroad Commissioners, consented to this modification of Contract No. 1 upon the following condition, viz. (Vol. 1 of Exhibits, p. 469):

> "PROVIDED, further, however, and it is expressly agreed, that this agreement shall take effect if and when, and only when, in addition to the consents aforesaid, there shall be duly executed and delivered in form satisfactory to the Board an agreement under seal between the City, the said John B. McDonald, the said Interborough Rapid Transit Company and the Manhattan Railway Company providing and assuring that, during the period of the lease contained in the said contract between the City and John B. McDonald made on or about the 21st day of February, 1900, and every renewal or extension thereof, any passenger upon the said rapid transit railroad traveling along Westchester avenue from the north as far as St. Ann's avenue, shall have the right as part of the same trip and without additional fare, to be carried thence upon the portions of the rapid transit railroad hereby added to the railroad of the Manhattan Railway Company along Third avenue, and thence southerly upon the railroad of the Manhattan Railway Company to any point upon the said railroad south of the intersection of the said Third avenue and Westchester avenue and that any passenger upon the said railroad of the Manhattan Railway Company traveling northerly along said Third avenue as far as Westchester avenue, shall have the right, as part of the same trip and without additional fare, to be carried easterly upon the portion of the rapid transit railroad hereby added along Westchester avenue to St. Ann's avenue, and thence continuing easterly or northerly to any point upon the eastern branch of the

rapid transit railroad as described in the said Routes and General Plan: * * * *."

This proviso was carried out in an agreement dated June 7, 1906, between the City, the Interborough and Manhattan Railway Company, which repeated substantially the provisions contained in the proviso last quoted. (Exhibits, pp. 483-485.)

While the Manhattan Railway Company as a corporation thus also assumed this obligation of free transfer at Westchester Avenue, near 149th Street, its first mortgage bondholders never assented to the same, and their mortgage having been executed in 1890, years prior to this agreement involving free transfers, it is settled law that such agreement for free tranfers is subordinate to the lien of the mortgage and may be rejected by the mortgage trustee and bondholders (*Public Service Commission* v. *Westchester Street Railway Company*, 206 N. Y. 209, 218). In the event of a disaffirmance of the Manhattan lease by the Interborough receivers, the Court would have to turn over the Manhattan property to the Manhattan receiver for operation. This in turn would compel the Manhattan first mortgage bondholders by their trustee to elect to declare the principal of their mortgage debt, amounting to $40,000,000 due and to foreclose the same. Thereby it would become beyond the power of the Manhattan Railway Company, as a corporation, to live up to the obligations of free transfer assumed by it under this agreement of June 7, 1906, executed in fulfillment of the agreement of July 16, 1903, both made with the City of New York. It follows that a disaffirmance by the Interborough receivers of the Manhattan lease without provision first being made for preservation of the free transfer arrangement would clearly disable the Interborough or its receivers from living up to these agreements with the City, calling for free transfer of passengers from subway to elevated lines at the point specified.

Thousands of people daily make use of this arrangement for free transfer from elevated to subway lines at 149th Street. Not only would the cessation of such free transfer arrangement result in grave inconvenience to the traveling public, not only would a discontinuance of it, as a result

of disaffirmance of the Manhattan lease constitute a breach of the agreement of July 16, 1903, which was a supplemental contract in modification of Contract No. 1, but furthermore, by the express terms of Contract No. 3, such breach would also constitute a default by the Interborough under Contract No. 3. (See Contract No. 3, Article II, Subd. 8, Articles XLVII-XLVIII. Exhibits, pp. 285, 356-7.)

Quite independently of the question of the illegality of such a breach of these agreements of July 16, 1903 and June 7, 1906, covering the free transfer arrangement at 149th Street and assuming for the purpose of argument that it would be within the lawful power of the Interborough receivers to disaffirm the Manhattan lease and incidentally discontinue and eliminate these transfer privileges, yet if the indirect result of pursuing such a course would be to make the Interborough suffer a default under Contracts Nos. 1 and 3, manifestly the most valuable asset of the Interborough (namely, its interest as a lessee in those Contracts) would be jeopardized and possibly sacrificed. That the receivers would embark upon a course fraught with such disastrous financial consequences to the receivership estate, which they are charged with the duty to conserve, seems almost unthinkable. However, this dire consequence is surely threatened, unless either there be no attempt at disaffirmance of the Manhattan lease whatsoever or else as an alternative, the receivers first succeed in securing the continuance of this public obligation of free transfer at 149th Street, as it is within the power of the Transit Commission by virtue of specific provision of the statute, to order and provide for in the event of the Manhattan leased lines being returned to its owners for operation.

Second: Article VI of the Elevated Extension Certificate granted to the Interborough March 19, 1913, granting it a franchise for the construction and operation of specified extensions to the Manhattan elevated railways held by it under lease, imposed as a condition of the grant the following provision as to fare (Exhibits, pp. 521-522):

> "The Interborough Company shall be entitled to charge for a single fare for each passenger for one

> continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) *shall be deemed a continuous trip in the same general direction.*"

Article IX of the same Certificate, also made a condition of the grant and as such expressly assumed by the Interborough, provides:

> "The City also agrees to provide the Interborough Company with trackage rights over parts of the municipal railroads to be constructed and to be equipped, maintained and operated under a contract bearing even date herewith between the City and Interborough Rapid Transit Company and over any extensions of such parts, and the *Interborough Company as grantee under this certificate agrees to operate over such parts in conjunction with the Railroads to the end that through service may be provided over such parts over the Railroads and over the Manhattan Railroad*". (Exhibits, p. 524.)

The intent and effect of these provisions is to impose the franchise obligation upon the Interborough of furnishing any passenger on the elevated lines with a continuous ride for the single fare of five (5) cents, not alone over the extensions granted by this Certificate, but also over the specified connected portions of the City-owned lines and *over the original elevated lines leased by the Interborough from the Manhattan in* 1903. The New York Court of Appeals so definitely held in *City of New York* vs. *Interborough Rapid Transit Company*, 257 N. Y. 20, 30, 36-38.

Third: Concurrently with the grant of the Elevated Extension Certificate to the Interborough, there was granted what is known as an Additional or Third Track Certificate. While this Certificate was granted to the Manhattan Railway Company as owner, nevertheless the terms of the grant are explicit and clear in providing that the rights granted might be enjoyed by the lessee (referring, of course, to the Interborough) provided such lessee should

> "assume and agree to perform all the obligations which by the provisions hereof are assumed by the Manhattan Railway Company" (Art. XIV; Exhibits, pp. 625-626).

In fact, in the definition section of the Certificate the words "Manhattan Company" are defined as used in the Certificate to

> mean the Manhattan Railway Company, its successors, assigns, *lessee*, * * * except that nothing contained in this definition or in this certificate shall be deemed to vest in any lessee *title* to the authorizations or licenses granted by this certificate". (Exhibits, pp. 587-588).

By agreement entered into by the Interborough and Manhattan, dated March 15, 1913 (Exhibits, p. 493), the Interborough expressly agreed with the Manhattan to

> "perform all acts, covenants, matters and things required of the Manhattan Company by the terms of said certificate."

The Interborough thereafter proceeded to accept the grant and to construct and operate the third tracks. It is significant that in the opinion of the New York Court of Appeals in the five cent fare case, *City of New York* vs. *Interborough Rapid Transit Company*, 257 N. Y. at 30, the Court, O'Brien, J., writing, says (italics ours):

> "On the same day an instrument known as the additional track certificate *was also issued to the Interborough.*"

By the terms of this Additional or Third Track Certificate, it was provided, as a condition of the grants thus assumed by the Interborough, that the railroads constructed over such third tracks:

> "shall be carefully and skillfully operated and with due regard to the safety of the passengers . . . The Manhattan Company (this as heretofore explained covering by express definition, the Interborough as lessee as well as the Manhattan Company as owner) shall during the term of the grants keep the plant and property . . . in thorough repair . . ." (Exhibits p. 605.)

The main object of having these third tracks constructed and operated was to provide for a through route or express service covering and extending over the elevated extensions granted to the Interborough by the Elevated Extension Certificate, the specified portions of connected municipally-owned subway railroads constructed under Contract No. 3, and the Manhattan railroad itself, through the use of these third tracks for such purposes of operation of express trains over the through route; and they have actually been so used right along up to the present time. It is further significant that this Third or Additional Track Certificate expressly provided as a condition of the grant

> "that no * * * grant, conveyance, transfer, lease or assignment and no mortgage hereafter made covering the authorizations or licenses hereby granted shall relieve the Manhattan Company [which by definition includes the Interborough] of its obligations hereunder or be valid unless the same shall have been approved by the Commission." (Exhibits, p. 626.)

Furthermore, it is provided that the express intention of the instrument is

> "that no change in the incorporation of the Manhattan Company or any such successor or future owner *or in the ownership or control of the authorizations or licenses hereby granted, or any of them shall diminish or affect the obligations of the holder of the same.*" (Exhibits, p. 626).

This Third or Additional Track Certificate contains no authority or provision to charge a fare for the ride over these third tracks, thereby further making manifest that the intention of the grant was that the ride to be carried over these third tracks should be merely a part of the continuous ride, which under the Elevated Extension Certificate (Article VI, thereof, hereinbefore quoted) passengers were entitled to over the extensions, the original Manhattan railroad and the specified connected portions of the City-owned subway railroads, all for the single fare of five cents. (See *City of New York, v. Interborough Rapid Transit Company*, 257 N. Y. (*supra*) at pp. 30, 37-38).

It thus clearly appears that the Elevated Extension Certificate taken in conjunction with the Additional or Third Track Certificate simultaneously granted on March 19, 1913, obligates the Interborough as a condition of these franchise grants, to operate the railroads over these additional tracks and furthermore, to carry passengers paying a fare of five cents by way of one continuous trip in the same general direction over the said elevated extensions, the additional tracks, the original Manhattan railroad and the specified connected portions of the City-owned subway.

POINT II.

It is well settled that obligations of the character thus assumed by the Interborough in the Elevated Extension and Additional Tracks Certificates, having been made a condition of the constitutional consent of the local authorities under Article III, Section 18 of the State Constitution, have the force of law in the sense that a breach of them constitutes a violation of law. It necessarily follows that these public obligations must be lived up to by and are binding upon the Federal receivers and do not come within the class of contracts as to which receivers have the power to elect to disaffirm and refuse to adopt.

The Constitution of New York State, Article III, Section 18, as it was amended in the year 1875, provides:

> "But no law shall authorize the construction or operation of a street railroad except upon the condition that * * * the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained * * *."

In *Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244, 259, Pound, J. said:

> "The power of the local authorities to impose as a condition to giving consent to the construction and operation of a street railroad that a stipulated rate of fare should be charged has been repeatedly upheld." (Citing cases.)

Again Judge Pound said (pp. 261-262):

> "But our Constitution, by requiring the consent of the local authorities, recognizes that our municipalities are *pro tanto* independent of legislative control, exercising some fragment of power, otherwise legislative in character, which has been thus irrevocably transferred by the fundamental law from the legislature to the locality."

The Elevated Extension Certificate of March 19, 1913, undoubtedly constituted the grant of a franchise to the Inter-

borough. Likewise the Additional Tracks Certificate of the same date constituted a grant of a franchise to the Manhattan Railway Company; the obligations contained in which latter grant were imposed by the City upon and assumed not alone by the Manhattan Railway Company but fully as much by the Interborough in its capacity of lessee of such additional tracks. The approval of the Board of Estimate and Apportionment to these two certificates constituted the consent of the local authorities under Article III, Section 18 of the State Constitution. Such consent of the Board to these two franchise grants was made with the Certificates before the Board in the form in which they were finally executed and the Board expressly provided in granting its consent that it should be "in accordance therewith," to wit, in accordance with the terms and conditions of the two Certificates respectively. This would seem clearly to mean that where the Certificates specify as a condition upon which they are granted that a continuous ride of prescribed extent be given to any passenger paying the stipulated rate of fare, the Board of Estimate by giving its consent "in accordance therewith" makes such condition of the Certificates a condition of the consent thereto.

In *Willcox* v. *Richmond Light & R. R. Company*, 142 App. Div. 44; affirmed 202 N. Y. 515, the Court held as stated in the headnote:

> "The refusal of a street surface railroad to issue and receive transfers to and from other lines as required by its charter ratified by the authorities of the municipalities in which it operates and as required by its contract with the municipality, is not a mere violation of a covenant, but is a 'violation of law' as the term is used in section 57 of the Public Service Commission's Law, and the Commission may compel the fulfillment of such obligation".

Since these *public obligations* assumed by the Interborough under these two Certificates have thus the force of a law of the State, as held in the authoritative decisions cited, it follows that such obligations at least do not fall within the class of contracts as to which Federal receivers

have the power to elect to disaffirm and refuse to adopt, this even though it be possible that the *rental or pecuniary obligations* of the lease are disseverable, and can validly be disaffirmed. (See this brief *infra* pp. 28-32). This must be true for two reasons:

(a) The Act of Congress now embodied in Section 124 of Title 28 of the United States Code (formerly Section 65 of the United States Judicial Code) originally enacted March 3, 1887, c. 373, Sec. 2, 24 Stat. 554; Aug. 13, 1888, c. 866, Section 3, 25 Stat. 436) is entitled "Management of property by receivers" and provides:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate *such property according to the requirements of the valid laws of the state* in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

In *Erb* v. *Morasch*, 177 U. S. 584, construing and applying this act of Congress, the Court held that an ordinance of the City Council of Kansas City, regulating the running of railroad trains through the City, had the force of law within the purview of this Federal enactment. Mr. Justice Brewer delivering the opinion of the Court said (at p. 585):

> "Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the State in which it is situated. Act of August 13, 1888, c. 866, § 2; 25 Stat. 433, 436; *United States* v. *Harris*, *ante*, 305".

In *Paige* v. *Schenectady Railway Co.*, 178 N. Y. 102, the New York Court of Appeals recognized the force of this Federal statute requiring receivers appointed by the Federal Court to conform with the laws of the State, and held that

the act of a Federal receiver of a street surface railroad in attempting to abandon a portion of such railroad without having obtained the approval of the Railroad Commission as required by the Railroad Law to such abandonment was unlawful. Martin, J., speaking for the Court said (p. 114, italics ours):

> "Moreover, in this case the receiver had no authority from the court to thus abandon a portion of the road. *He was required to operate and conduct the business of the road in accordance with the laws of the state, which gave him no authority to abandon any portion of the mortgaged property.* (*Erb* v. *Morasch*, 177 U. S. 584.)" (Italics ours.)

(b) Quite independently of Section 124 of the U. S. Code, well considered decisions have recognized that the rule or doctrine permitting receivers to disaffirm or refuse to adopt unprofitable contracts made by the insolvent corporations of which they are receivers, has no application to a franchise obligation assumed by or imposed upon a railroad corporation as a condition of its enjoyment thereof, by virtue of the terms of the grant from the State or City.

Pittsburgh & Shawmut Coal Co. et al. vs. *Delaware & N. R. Co.* 289 Fed. 133, 134

Westinghouse Electric & Mfg. Co. vs. *Binghamton Ry. Co.* 255 Fed. 378

Gas & Electric Securities Co. vs. *Manhattan & Queens Traction Corporation*, 253 Fed. 453

Lorain Steel Co. vs. *Union Ry.* 165 Fed. 500, 502, 503.

POINT III.

In 1922 the Legislature amended Section 49, subd. 4 of the Public Service Law by adding a provision specifically designed to clothe the Transit Commission with power to order the continuance of these through routes and transfers of passengers between the Interborough and Manhattan Railways in case the Manhattan lease of 1903 should be abrogated, either by disaffirmance or by reentry of the owners upon the Manhattan leased property. The rights of the City and of the travelling public under this provision have been ignored and should now receive paramount consideration.

By Chapter 153 of the Laws of 1922, subdivision 4 of section 49 was amended by the addition of the following provision:

> "In case upon the termination of a lease or otherwise the owner or lessor of a rapid transit railroad resumes operation thereof and thereupon such owner or lessor or the lessee discontinues or threatens to discontinue or refuses or threatens to refuse to permit operation over any extension or extensions of such rapid transit railroad or railroads or any of them, or discontinues or threatens to discontinue or refuses or threatens to refuse to permit operation over other railroads on which such lessee had operated under trackage rights, then and in either of those events the commission may order that through cars for the transportation of passengers shall be operated over such extension or extensions and over the tracks of such other railroad over which such lessee may have had trackage rights, and the commission shall have power, after a hearing, to require by order such operating, including the right to order such switch or other connections or interchange tracks as may be necessary, and if so required, to determine as to the division of the expense of the maintenance and operation thereof. The commission may, after a hearing, prescribe the terms and conditions upon which such operations shall be conducted and the manner in which receipts and expenses shall be apportioned.

"Pending the hearing or hearings provided for herein, and the determinations and orders of the commission thereon, the commission shall have power, if in its judgment the public interest requires it, to issue a temporary order requiring said rapid transit railroad companies to receive from each other, and transport for each other, such cars over each other's tracks by way of switch connection or interchange track, and if no such switch connection or interchange track exists, to construct and maintain said switch connection or interchange track; and upon the completion of said hearing or hearings, and the determinations and orders of the commission thereafter made, the terms of the receipt and transportation of cars, and the readjustment of compensation and expense involved, shall take effect as of the original date of such temporary order of the commission.

"If upon the expiration or earlier termination of a lease, the free transfer or interchange of passengers, theretofore in effect and permitted by the lessee of a rapid transit railroad at any point or points between the lines of the rapid transit railroads owned or leased and operated by it, is discontinued or is threatened to be discontinued, the commission shall have power by order to require the companies, by which the said lines of rapid transit railroads may be operated after the termination of the lease, to continue or re-establish such through routes formerly existing, and to establish joint rates, fares and charges for the transportation of passengers thereon in the manner provided by subdivision three of this section.

"Pending the hearing or hearings provided for herein, and the determinations and orders of the commission thereon, the commission shall have power to issue a temporary order requiring the companies then operating said lines of rapid transit railroad to restore the said free transfer or interchange of passengers at the point or points on said rapid transit railroad lines where the said free transfer or interchange was formerly in effect and permitted; and upon the completion of said hearing or hearings, and the determinations and orders of the commission thereafter made, the terms and conditions under which the portion of said joint rates, fares and charges to which each company shall be entitled and the manner in which the same shall be paid and secured, shall take

effect as of the original date of such temporary order of the commission."

At the time this provision was enacted, the Interborough was in financial difficulties, a receivership was under discussion, and the lopping-off of the Manhattan lease was threatened (see this brief, p. 7).

This amendment, still on the statute books, was designed by the Legislature to meet precisely the kind of situation which now seems imminent. If the Interborough receivers and security holders persist in their apparent disposition to procure a disaffirmance or abrogation of the Manhattan lease, clearly the public policy so declared by the Legislature demands that proceedings be taken promptly under the provision quoted, to insure the continuance of through routes and free transfers without increase of fare; yet no effort whatsoever appears to have been made in this direction.

The receiver, the stockholders and the mortgage bondholders of the Manhattan Railway Company have distinctly taken the position that they are opposed to a disaffirmance of the lease (the Manhattan receiver claiming indeed that there is no legal power to disaffirm), and furthermore, that they would not be eager to exercise the legal right of reentry on the demised premises, even if rental payments be delayed.

As for the City's position on this subject, the Corporation Counsel recognizes, that it is a grave question whether the Manhattan lease, in view of the public obligations superimposed upon it and inextricably interwoven with it, can lawfully be disaffirmed within the doctrine relating to disaffirmance of unprofitable contracts by receivers. The concern of the City in this matter is primarily that these public obligations of through route and free transfer of passengers should be preserved intact under the receivership, as they have been in the past. The City is, however, desirous, by reason of the public interest there also involved, that rental payments, if too high, should be reduced to more moderate proportions.

That the rental payments under the Manhattan lease have been entirely too high, has been the viewpoint from

which the Interborough receivers and security-holders have appoached the subject. Proceeding upon the assumption that the lease is disaffirmable if unprofitable, they and their counsel have up to now relied on the right of a receiver to a reasonable time before exercising his election to affirm or disaffirm contracts. During these seven months of receivership, their time and attention have been chiefly directed to investigation, applications to the Court for instructions and controversies with the Manhattan receiver and security-holders as to payments under the lease during the trial period. This has involved complicated questions of fact and of law as to what are the true earnings of the leased properties, and what would be a correct "formula" for the ascertainment of such earnings and what the correct rule may be as to payments to be made during such trial period.

These questions have been the subject of hearings before the Court and of references to the Special Master, before whom voluminous testimony has been taken,—all predicated on the assumption that the lease is disaffirmable. Successive "interim orders" by way purely of "administrative instructions to the receivers" have been applied for, opposed and at times granted, relating to the pecuniary obligations growing out of the Manhattan lease,—all this being done by way of preparedness for a possible disaffirmance of the lease.

In striking contrast to this zealous attention to pecuniary interests, the record of this receivership during these seven months will be searched in vain for the slightest indication of any attention on the part of the Interborough receivers or security holders' committees to the preservation of rights of the travelling public or the continued observance of franchise obligations connected with the lease. Neither these receivers nor these committees have approached the City, in Court or out of Court, with any suggestion whatsoever looking to measures to preserve these public rights and obligations in the event of disaffirmance of the lease.

We respectfully submit that in any discussion of the subject of possible disaffirmance or abrogation of the lease, a paramount consideration which should receive first atten-

tion is the matter of making proper arrangements to preserve the rights of the travelling public, and that every private interest in these properties must be held "*cum onere* the public."

POINT IV.

In case the Interborough interests hereafter contend that a disaffirmance of the lease would result in the abrogation of any of the through route and free transfer privileges which have been superimposed upon the lease, any such contention should be submitted to the State Courts, and not to the Federal Receivership Court for adjudication.

The Corporation Counsel submits that Section 49, Subdivision 4, of the Public Service Law, is broad and flexible enough to permit of the continued uninterrupted enjoyment by the traveling public of the joint route and free transfer privileges now existent, even in the event that the Interborough Receivers are permitted to disaffirm the lease, provided that without further delay they invoke the powers of the Transit Commission and seek its cooperation. Thus *pari passu* with further proceedings in the Receivership Court in the matter of disaffirmance, the Commission can hold its hearings and reach its determination and mold its order. Whether or not the Interborough Receivers will seek this relief depends upon their initiative and such instructions as the Receivership Court may upon application of any of the interested security-holders of the Interborough or Manhattan decide to give them in the premises.

On the other hand, it is conceivable that the Receivers will decline to seek the aid of this State regulatory agency. Possibly it may be contended that the Receivers' alleged power to disaffirm the lease will carry with it the abrogation of these public obligations. Possibly the claim will be asserted on behalf of the Interborough Receivers or security holders that with the disaffirmance of the lease at least some

or all of these public privileges will no longer be operative or enforceable. So it was, that in the case of the Metropolitan, B. R. T. and New York Railway receiverships, the disaffirmance of leases which had been entered into under a State statute authorizing the same, upon condition that there be free transfer privileges between the railway lines of the lessor and lessee, were treated by those Receivers, each in turn as abrogating the free transfer obligations. By parity of reasoning it may be claimed in the instant case by the Interborough Receivers or security-holders that if the Manhattan lease is disaffirmed that will end the public obligations of through route and free transfer which have been superimposed upon such lease. The Corporation Counsel is of the opinion that such a position is wholly untenable; nevertheless, it may be the position taken. In that event or if for any other reason the paramount and controlling character of these public obligations is not admitted and sought to be observed by the Interborough Receivers, controversy is bound to follow.

It is earnestly submitted that the Federal Receivership Court is not the forum in which such a controversy should be litigated or determined. Novel and intricate questions would be involved calling for the construction of State statutes and of consents of local legislative bodies, as well as considerations of State and local policy. Decisions of this Court point clearly to the propriety of choosing the State Court rather than the Federal Court for the determination of questions of this character. See *Rogers* v. *Guaranty Trust Company of New York*, decided January 23, 1933 (77 L. Ed. Adv. Op., pages 382, 386), *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 207, and *U. S. ex rel.* vs. *Tyler*, 269 U. S. 13. See also *Dexter* vs. *Bank*, 5 Fed. (2) 1. (C. C. A.)

But there are other considerations also making strongly for the proposition that the State Court is the proper forum, rather than the Federal Receivership Court. It cannot be denied that these controverted questions, if they arise, should be determined as soon as possible. To prevent hardship and inconvenience to the travelling public, these questions should be determined in advance of a disaffirmance,

and not be made the subject of protracted litigation *after* the lease has been abrogated and the leased property turned over to the Manhattan Receiver for separate operation.

Such considerations give added point to the suggestion by the learned counsel for the Interborough Receivers below that a determination of this character at the present time in the Receivership Court would be technically premature, and would be in the nature of an action for a declaratory judgment. This remedy of an action for declaratory judgment is one that may not be pursued in the Federal Court. On the other hand it is a remedy which is open in the State Court to any of the interested parties, including the Receivers.

More than this: The responsibility that devolves upon the Receivership Court itself, as well as upon its Receivers, may well lead to the recognition of the fact that the sooner these questions are determined, the less is the danger of the receivership being abused and perverted into an instrumentality that will unlawfully disrupt and dismember existing transit facilities and work immense inconvenience and unnecessary additional expense in increased carfares to the traveling public. This points to the advantage that can be derived from availing of the *summary remedies* which by special statute are open in the State Court, additional to and far more speedy than an action for a declaratory judgment.

There are two classes of proceedings of this kind that are summary in nature and that are accorded a preference by statute under the laws of the State of New York. Both are remedies which call for the institution of the proceeding by the City or the Transit Commission as plaintiff or moving party. It may well be that the Federal Receivers, under the instructions of the Receivership Court, may invite or facilitate the institution of these summary remedies by the public authorities in order that an authoritative decision may be obtained from the New York Court of Appeals before the receivers' "trial period of operation" has expired. Such a decision would furnish guidance in determining whether there could or should be a disaffirmance of the Manhattan

lease, and also in what manner and to what extent the public rights to through routes and free transfers may be preserved uninterruptedly.

We invite the attention of the Court to the statutes which authorize these special proceedings in the State Court and which, under the well settled rule, could not be brought in the Federal Court, viz:

First. Section 9 of the Rapid Transit Act (Laws 1891, Ch. 4, as amended by Laws 1909, Ch. 498, Sec. 4) provides, *inter alia*, as follows:

> "1. The said commission . . . may sue in the name and behalf of the city for which it acts as a commission. It may in the name of and in behalf of the said city . . . apply by mandamus to compel the performance within said city by any corporation or person of any duty or obligation with reference to or arising out of the construction or operation of any railroad under, or by reason of, any grant made or right acquired under this act or the acts amendatory hereof or supplementary hereto, or out of or by reason of any contract made or authorized by any board of rapid transit railroad commissioners within its city or the public service commission . . .
>
> 2. Every action or proceeding brought by the commission, and every action or proceeding in which an injunction is had or sought against the commission or the said city, or against any corporation or person who or which shall have entered into a contract under the provisions of this act, or any act supplementary hereto, or amendatory hereof, by reason of any act or thing done, proposed or threatened under or by virtue of any provision of this act, or any act supplementary hereto, or amendatory hereof, or is sought against any corporation or person claiming or claiming to act under any grant or franchise under this act, or any act supplementary hereto, or amendatory hereof, and every action or proceeding in which the constitutionality of any part of this act, or of any act supplementary hereto, or amendatory hereof, shall or may be brought in question, shall have a preference above all causes not criminal on the calendar of every court, and may be brought on for trial or argument upon notice of eight days for any day of any term on which the court shall be in session."

Second. Section 57 of the Public Service Law provides as follows:

> "§ 57. *Summary Proceedings.* Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief."

Willcox vs. *Richmond Light & R.R. Company*, 142 App. Div. 44 (affirmed 202 N. Y. 515), *supra*, is authority for the proposition that under this section, the Commission may

institute a proceeding against a street railroad company that fails to supply the free transfer privilege which was imposed by the local authorities as a condition of the grant of its franchise.

POINT V

If this Court should decide that a receivership of the Interborough should continue, the City of New York respectfully suggests that for the protection of its rights this Court impose the following conditions and directions for the conduct of the receivership:

> **First: That the Receivers should not disaffirm any lease or otherwise impair their present ability to perform all franchise obligations to the City (including the preservation of through routes, free transfers and the five cent fare), without previously making alternative arrangements for furnishing, at the expense of the Interborough, the same through routes and free transfers at the existing fare of five cents and no more.**

These franchise obligations of the Interborough have been discussed in Point I (*supra*, pp. 16-23). They include the duty to furnish through train service over the elevated lines of the Manhattan Railway Company in conjunction with the Jerome Avenue, Webster Avenue and White Plains Road lines in The Bronx and the lines in Queens Borough now operated by the Interborough. Similarly the Interborough is obligated to furnish free transfers between the City-owned lines and the Manhattan elevated lines at 149th Street and Third Avenue in The Bronx.

These franchise obligations are contained, *inter alia*, in the so-called Interborough Certificate and the Supplementary Agreement for trackage rights, both dated March 19, 1913 (Exhibits 4 and 5 in this proceeding; see Record, page 343, folios 1027, 1028; Exhibits, pages 505, 521-2, 524;

651, 654-5), and in an Agreement dated July 16, 1903 (Exhibits, pages 465, 469-470).

It may well be that the Interborough can best perform these obligation by continuing to observe its lease of the Manhattan elevated lines but it would be erroneous to suppose that a disaffirmance or termination of that lease, or even the sale of the Manhattan elevated lines upon foreclosure, would absolve the Interborough from these franchise obligations. On the contrary, such eventualities would merely require the Interborough to obtain and utilize trackage and traffic rights in order to perform its obligations to the City.

It must not be forgotten that a railroad is primarily a public highway and that the primary function of a railway company, such as the Manhattan, is to maintain such highway for the use of trains of other companies, as well as its own trains, without unreasonable discrimination. Thus the granting of trackage rights is an inherent function of a railway company, and apart from the statutory provisions for trackage rights mentioned below, it would be conceivable for the Interborough by agreement with the owners from time to time of the Manhattan elevated lines to arrange for the trackage and transfer rights requisite to satisfy the Interborough's obligations to the City, even if the lease were abrogated.

Baldwin, American Railroad Law, pages 7, 8, 462.

Lake Superior & Miss. R. R. v. U. S., 93 U. S. 442, 446-451.

Union Pacific v. Chicago, R. I. & P. Ry., 163 U. S. 564.

The Interborough and its Receivers are not limited, however, to mere negotiations with the owners of the Manhattan lines for maintenance of such trackage and transfer arrangements in case of disaffirmance or termination of the Manhattan lease. § 49, subdivision 4 of the Public Service Law, as amended in 1922 makes specific provision for this contingency (see Point III, *supra*.)

For present purposes it is unnecessary to consider

whether the existing Manhattan lease is part of a "unitary franchise" including the franchises under the Interborough and Manhattan Certificates and Contract No. 3. It is of the utmost importance, however, that the binding obligations of the Interborough Company, sanctioned by franchise, by contract and by law, to furnish through transportation and free transfers, as above described, upon a five cent fare, be strictly observed; and if the Court sees fit to continue this receivership, we respectfully ask that the Court prevent its abuse by admonishing that the Manhattan lease should not be disaffirmed without previous consummation of arrangements for compliance by the Interborough and its Receivers with their obligations above described.

Second: That if the receivership is to be continued, the Receivers be instructed to use every effort to effect an extension, renewal or refunding of the past due Interborough notes.

It can hardly be contended that there would be any justification for this receivership if the two note issues which recently matured, were refinanced. As the Record itself indicates (page 535), the Interborough has adequate operating income and resources to care for all current requirements. The matter of first importance for the Interborough at this time is to refinance its capital maturities and obligations as other railroad companies and public utilities are doing, and the Receivers should not be permitted to devote their primary efforts and attention to projects for disintegrating the traction system while this primary duty of arranging for refinancing is neglected by all concerned.

If the receivership is to be continued, we respectfully submit that the Receivers should be admonished to use their best efforts to effect such refinancing.

Third: That if the receivership is to be continued, it should be expressly without prejudice to the right of the City to have its rights under its contracts with the Interborough and under grants of franchises and other rights to the Interborough

and to the Manhattan Railway Company, declared and enforced from time to time in appropriate proceedings in the Courts of the State of New York.

See Point IV (*supra* pp. 32-7).

As to such matters the observation of this Court in *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 207, is very much in point:

> "The record is voluminous; the contracts between the parties are complex; the relevant statutes intricate. No decision of this Court or of any court of New York authoritatively determines the questions at issue. The basic one calls for construction of complicated State legislation."

Fourth: That if the receivership is to be continued, the receivers be instructed to adhere to the strictest economy and to avoid all unnecessary expenditure in the further conduct of the receivership.

Under the provisions of Contract No. 3 the City has a vital concern that the expenditures of the receivership be kept within as low limits as is possible. In the case of the Brooklyn Rapid Transit Receivership, which involved the operation by the Receiver of the City-owned railroads constructed under Contract No. 4, and as an aftermath of such Receivership, the Transit Commission in behalf of the City filed objections as permitted under Contract No. 4, to the charging of many unusual and temporarily increased expenditures entailed by the Receivership as part of the operating expenses which the Receiver had claimed the right to include as such. A compromise finally was effected. Under the scheme of Contract No. 3, as was the case with Contract No. 4, objections of this character would not be litigated in the receivership Court, but the Transit Commission has the right to make objections which, if not acceded to, are referred to arbitrators for determination. That such additional Receivership expenses should be kept as low as possible is of interest to the City of New York because the greater such

expenses be, the further is the City's deferred return on its investment postponed.

Messrs. Dowling and Murray, the two Interborough receivers, applied to the receivership court for interim allowances at the rate of $5,000 per month to each of them. The Corporation Counsel, appearing specially on the hearing upon this application and being permitted by the Court to state his views on behalf of the City as *amicus curiae*, opposed such interim allowances as excessive. For the Court to allow these receivers a basic compensation of $60,000 a year to each of them, by way of interim allowance, which in the usual way would at the termination of the receivership, be enhanced by large additional awards to them, may result in giving to each of these receivers compensation greater than that received by the President of the United States. Despite this protest voiced on behalf of the City of New York, the Court has ordered "interim" allowances of $30,000 "on account" to each of these receivers.

This Court in *Harkin* vs. *Brundage* 276 U. S. 36, (decided in 1928) Mr. Chief Justice Taft speaking, in the happier days that preceded the present world depression, said (at p. 57): (italics ours)

> "The Federal court should, before surrender, fix and pay the compensation due to its officers for the work done by them and, in doing so, should take care to fix the compensation *within limits which are plainly reasonable.*"

Fifth: That if the receivership is to be continued, the receivership Court should be instructed to terminate the receivership as speedily as possible.

In *Re Metropolitan R. Receivership* 208 U. S. 90, 111, this Court, speaking by Mr. Justice Peckham said (italics ours):

> "* * * we are not unmindful of the fact that a court is a very unsatisfactory body to administer the affairs of a railroad as a going concern *and we feel that the possession of such property by the court through its Receivers should not be unnecessarily prolonged.*"

Mr. Justice Peckham further said (page 112, italics ours):

> "The orders appointing the Receivers and giving them instructions are most conservative and well calculated to bring *about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it. We have no doubt, if unnecessary delays should take place, the court would listen to an application by any creditor upon due notice to the Receivers for orders requiring the closing of the trust as soon as might be reasonably proper or else vacating the orders appointing the Receivers.*"

Despite the admonition of this Court, this Metropolitan Street Railway receivership lasted from September, 1907 until December, 1911, a period of over four years. The federal receiverships of the Brooklyn Rapid Transit Company and of the New York Railway Company each lasted even longer. In all three of these previous receiverships, mortgage foreclosures followed promptly upon the heels of the institution of the general creditor's suits; and unquestionably in each of them a far more serious condition of insolvency existed than here. No bill of foreclosure of the Interborough mortgage has been filed in the instant case.

A termination of these proceedings could be effected in a few months and the threatened federal disintegration and disturbance of the rights of the travelling public be prevented, if the terms suggested in this Point be imposed by this Court as condition of the continuance of the receivership.

Dated, New York, April 17, 1933.

Respectfully submitted,

ARTHUR J. W. HILLY,
Corporation Counsel.

EDGAR J. KOHLER,
FRANK E. CARSTARPHEN,
of Counsel.

APPENDIX A

BOARD OF ESTIMATE AND APPORTIONMENT CITY OF NEW YORK

(Cal. No. 674)

Whereas, Heretofore and on the 26th day of August, 1932, there was filed a bill of complaint of the American Brake Shoe & Foundry Company, as plaintiff, against the Interborough Rapid Transit Company, defendant, in the District Court of the United States for the Southern District of New York, seeking the appointment of an equity receiver; and

Whereas, Thereafter and on the 26th day of August, 1932, the defendant admitted the allegations of the complaint and consented to the appointment of the receiver; and

Whereas, Thereafter and on the 26th day of August, 1932, the Honorable Martin T. Manton, United States Circuit Judge, having designated himself to sit as District Judge, appointed temporary receivers, the Honorable Victor J. Dowling and Thomas E. Murray, Jr., and in the same order directed that all parties in interest show cause on the 22d day of September, 1932, at 10.30 a. m., why the said receivership should not be continued during the pendency of this suit and setting forth that upon the hearing thereon any other creditor or the defendant or other party in interest may be heard; and

Whereas, The City of New York has heretofore entered into contracts known as contracts numbered 1, 2 and 3, with the Interborough Rapid Transit Company for the operation of certain rapid transit subway lines in The City of New York; and

Whereas, The City of New York has expended in construction of said subway lines the sum of $178,908,046.92; and

Whereas, For the purpose of creating a sinking fund and paying the interest upon its bond issue, The City of New York has expended and set aside the sum of $70,975,131.53; and

Whereas, Under the provisions of contract number 3 the above mentioned sum and the additional sum of $43,374,604.37 is the amount that has accumulated as the City's share from the operations of the subway under contract number 3; and

Whereas, The interest on these two sums amounts to the sum of $34,210,610.39, making a sum total of $148,560,346.29 upon which there has been paid by the present lessee to June 30, 1932, the sum of $18,281,971.50, leaving a balance due the City of $130,278,374.79; and

Whereas, The total interest of the City in the subway is the sum of $309,186,421.71; be it

Resolved by this Board, The Corporation Counsel of The City of New York is instructed to take such steps as from time to time he shall deem necessary and proper for the protection of the above enumerated interest of The City of New York under contracts numbered 1, 2 and 3 with the Interborough Rapid Transit Company in the said receivership either before the Federal Courts or in the State Courts to duly protect the interests of The City of New York; be it further

Resolved, That the Corporation Counsel of The City of New York be instructed to appear specially in the pending receivership and seek direction from the Court to have all papers and proceedings, motions and decrees served upon him and submitted for his consideration so that the City and this Board may be apprised at all times of the progress of the receivership in order that the Corporation Counsel may thereby be enabled to take such steps either in the receivership or otherwise as shall be deemed best for the protection of the interests of The City of New York.

A true copy of resolution adopted by the Board of Estimate and Apportionment, September 30, 1932.

JOSEPH F. HIGGINS,
Assistant Secretary.